Office-Supreme Court, U.S.
FILED
MAY 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION

Of Counsel:

DAVID J. DORSEY
DAVIS, ARNEIL, DORSEY, KIGHT & PARLETTE
617 Washington Street
P.O. Box 2136
Wenatchee, WA 98801
(509) 662-3551

JAMES B. VASILE
Counsel of Record
MICHAEL F. HEALY
JILL E. GRANT
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600

Attorneys for Petitioner Public Utility District No. 1 of Chelan County, Washington

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF POSITION	1
ARGUMENT	4
I. NEPA DOES NOT MANDATE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT PRIOR TO ISSUANCE OF A LICENSE CONTAINING A RESERVATION OF THE RIGHT TO IMPOSE ADDITIONAL FISH PROTECTION MEASURES	4
II. THE FEDERAL POWER ACT DOES NOT BAR ISSUANCE OF A LICENSE CONTAINING A RESERVATION OF THE RIGHT TO IMPOSE ADDITIONAL FISH PROTECTION MEASURES	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 104 S.Ct. 2105 (1984)	3, 8
FCC v. Schrieber, 381 U.S. 279, 290 (1965)	6
Lac Courte Oreilles Bands v. FPC, 510 F.2d 198 (D.C. Cir. 1975)	3
Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965), *cert. denied*, 384 U.S. 941 (1966)	8
Udall v. FPC, 387 U.S. 428 (1967)	8
Statutes:	
Administrative Procedure Act, 5 U.S.C. § 558(c)	7
Federal Power Act, § 4(e), 16 U.S.C. § 797(e)	3, 8
§ 6, 16 U.S.C. § 799	3, *passim*
§ 15, 16 U.S.C. § 808	2, 7
National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C)	1, *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1365

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION

SUMMARY OF POSITION [1]

As is amply illustrated by FERC's Brief in support of Chelan's Petition and the Brief for the Secretary of Commerce in Opposition, the instant case involves sharp divergences between two major agencies of the federal government regarding their understanding of the requirements of two significant federal statutes—the Federal Power Act and the National Environmental Policy Act (NEPA).

---

[1] We have conferred with the Federal Energy Regulatory Commission and it concurs with our submission contained in this summary.

The main underpinning of the court of appeals' decision, as interpreted by the Secretary of Commerce (Secretary) is that "[u]nder the Federal Power Act . . . the Commission must start from a clean slate in deciding whether to relicense a particular project." Commerce Brief at 10; Brief for the Yakima Indian Nation, National Wildlife Federation and State of Washington Departments of Fisheries and Game (hereinafter referred to as "Yakima Brief") at 22. From there, the Secretary reasons that for NEPA purposes, a relicensing "plainly constitutes either a proposal itself or the revision of an ongoing program" requiring an environmental impact statement (EIS). Commerce Brief at 11. At the same time, however, the Secretary asserts that "an EIS will be required only where a particular dam's operations *significantly* affect the environment . . . ," Commerce Brief at 12; emphasis added. These are inconsistent positions which underline the very issue that needs to be resolved by this Court, *i.e.* whether there is an unyielding rule automatically requiring an EIS on every relicensing [2] or whether that question is to be determined on a case-by-case basis.[3]

The resolution of that question depends in large measure on an answer to the broader question of how one views the Commission's relicensing obligations under section 15 of the Federal Power Act, 16 U.S.C. § 808, an

---

[2] The Ninth Circuit clearly believed that such a rule should apply. For example, the court stated: "Both the consideration of what conditions to attach to a new license and the questions involved in determining whether a non-power license is necessary necessitate information prepared in an [EIS]". Pet. App. 20-21.

[3] Respondents seem to find a basis for an EIS from the fact that there are fish questions to be resolved. *E.g.*, Commerce Brief at 8-9; Yakima Brief at 24. As pointed out in the Commission Brief in support of the Petition, that is a Federal Power Act issue, and unless the status quo of the project is changed, it does not automatically trigger the application of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). See FERC Brief at 12, n.5.

issue left open by this Court in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 104 S. Ct. 2105, 2114, n.23 (1984). To be sure, *Escondido* dealt in terms of section 4(e) of the Act, 16 U.S.C. § 797(e). It will not do, however, to dismiss *Escondido* as therefore "irrelevant." Commerce Brief at 9, n.6. Rather, the issue left undecided in that case is the issue at the core of this case—the Commission's basic responsibilities on relicensing, as contrasted to its duties in the initial licensing process.[4] It is our submission that those duties significantly differ.

The Secretary further claims that "even if EIS preparation is burdensome for the agency, Congress has made the judgment in NEPA that an EIS is required." Commerce Brief at 12. We do not, of course, argue that congressional intent does not control. Our position simply is that Congress did not intend to adopt such a hard and fast rule invariably requiring an EIS on relicensing and that, in gleaning Congress' intent, it is not unreasonable to consider the nature and extent of the burdens that a proposed statutory construction imposes upon an agency. Moreover, the Secretary has offered no support for the conclusory assertions that the Commission should be able to prepare an EIS within "the existing time period already required for relicensing," Commerce Brief at 12, or that the "burden of preparing an EIS . . . should be significant." *Id.*

Fairly read, the Secretary's discussion concerning the Section 6 issue, Commerce Brief at 12-14, serves only to underscore the Commission's claim, FERC Brief at 16, 19-21, that the decision below creates confusion and un-

---

[4] The Secretary's reliance on *Lac Courte Oreilles Bands v. FPC*, 510 F.2d 198 (D.C. Cir. 1975), Commerce Brief at 8, 10, for the proposition that those responsibilities are the same in either situation is misplaced, since the issue in that case concerned whether the Commission must issue annual licenses while deciding on relicensing. 510 F.2d at 200.

certainty. According to the Secretary, the Court's "holding" simply requires the Commission to "study" a project's effect on fish resources before issuance of a license, and no more. Commerce Brief at 12. But, if that were all, the Commission met the Court's test by basing its 1981 conditions on the best data then available. FERC Brief at 19.

Nor does the Secretary fully explain what that "study" requires—although it seems that he would read the opinion of the Ninth Circuit as requiring a full determination of the fishery issues before a license may issue. Commerce Brief at 13, 14. But that goes to the heart of the dilemma caused by the Court's ruling. As things now stand, under the Ninth Circuit's construction the Commission may either issue a license with the hope that the licensee will agree to later "modifications," issue a license based on guesswork or issue no license at all.[5] Without an authoritative determination of its statutory powers, the Commission cannot adequately perform its statutory duties in considering the approximately 100 licenses each year that need "open ended" conditions or "reopener clauses." FERC Brief at 16.

ARGUMENT

I. NEPA DOES NOT MANDATE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT PRIOR TO ISSUANCE OF A LICENSE CONTAINING A RESERVATION OF THE RIGHT TO IMPOSE ADDITIONAL FISH PROTECTION MEASURES

The inappropriateness of automatically requiring an EIS on every relicensing is aptly illustrated by the instant case. The Secretary acknowledges that a non-power license is not an option in this case. Commerce Brief at

---

[5] We emphasize that the section 6 issue is present both at the original licensing stage as well as at relicensing.

10, n.7.[6] Thus, there is no question that of the four options open on relicensing to the Commission under the Act—(1) federal takeover, (2) issuance of a non-power license, (3) issuance of a license to a new licensee, or (4) issuance of a new license to the original licensee—only the last was available to FERC with respect to the Rock Island project.[7]

Respondents rely on the fact that a new license could contain different conditions, and that "operational modifications to the project for the purpose of protecting anadromous fish" should be considered in an EIS. Commerce Brief at 11 & n.8. However, because a new license, under the statute, had to be granted to Chelan (regardless of what type of fish measures are ultimately chosen) there has been no change in the status quo of the environment, and hence no "major federal action significantly affecting the quality of the human environment" under section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The Ninth Circuit's total rejection of the long-established doctrine that an EIS is not required if an agency decision does not create a change in the status quo should be corrected by this Court's issuance of a writ of certiorari.

---

[6] The Yakima Brief similarly states that "the Court discussed that alternative . . . merely to illustrate the breadth of review required by the FPA at relicensing." *Id.* at 25-26. A non-power license would not be a reasonable alternative, even if it had been sought, because it would be an unjustifiable means of resolving environmental problems of a seasonal or episodic nature related to migration of juvenile anadromous fish.

[7] The Ninth Circuit noted in its opinion that there was no competing applicant, Pet. App. 8. In its order denying rehearing, the Ninth Circuit also corrected its error that FERC would have to consider in an EIS the possibility of federal takeover since federal takeover is inapplicable to projects operated by municipalities such as Chelan. Pet. App. 75.

II. THE FEDERAL POWER ACT DOES NOT BAR ISSUANCE OF A LICENSE CONTAINING A RESERVATION OF THE RIGHT TO IMPOSE ADDITIONAL FISH PROTECTION MEASURES

The constant refrain of Respondents in their Briefs in Opposition is that the Commission did not have to issue a new license to Chelan, but could have simply granted annual licenses until the Commission was prepared to impose additional fish protection measures. *E.g.*, Commerce Brief at 15; Yakima Brief at 18. The issue, however, is whether the Federal Power Act mandated the procedure which Respondents and the Ninth Circuit prefer or whether the procedure chosen by FERC was reasonable and "capable of permitting [FERC] to discharge [its] duties" under the Federal Power Act. *FCC v. Schrieber*, 381 U.S. 279, 290 (1965).

In its Petition, Chelan contended that the linchpin of the Ninth Circuit's holding was that FERC could not impose further conditions for fish protection after issuance of the license. Chelan further contended that there was no support for this position and that it was in conflict with longstanding Commission practice, approved by Congress, of issuing licenses with a reservation of authority to modify project structures and operations. Respondents now contend in their briefs that the discussion by the Ninth Circuit of the Commission's power, pursuant to § 6 of the Act, to modify a license once issued was either merely "dicta," Commerce Brief at 12, or "subsidiary to its main holding," Yakima Brief at 13. Respondents state that the court's decision was based on a "solid analysis" of the Federal Power Act, Yakima Brief at 14, albeit an anlysis that Respondents themselves seem unable to articulate, given their statement that "we will not repeat it [the analysis] here." Yakima Brief at 14.

In fact, the Ninth Circuit's "analysis" of the Act consists principally of heavy reliance upon language from

a House Committee Report accompanying the 1968 amendments to section 15, from which it reaches the conclusion that "relicensing" is the same as "initial licensing" for all purposes. Pet. App. at 8-9. The Secretary again quotes from this Report in which it is stated that "relicensing" would "be deemed to involve 'initial licensing' within the context of the Administrative Procedure Act rather than 'license renewal'." Commerce Brief at 9. However, it appears that Congress was addressing in this language problems under the APA, such as the fact that if relicensing were considered to be license "renewal" under the APA the license would not expire "until the application has been finally determined by the agency." 5 U.S.C. § 558(c). This provision of the APA would be inconsistent with the specific provision of § 15 of the Federal Power Act requiring issuance of annual licenses upon expiration until a new license is issued. For this reason and others already set forth in Chelan's Petition, Pet. at 16, n.12, the legislative history relied on by the Ninth Circuit and Respondents is irrelevant to the issues presently before the Court as to whether the Commission's responsibilities and options on relicensing differ from those on initial licensing.[8]

Another example of the Ninth Circuit's "solid analysis" is its reference to certain decisions under NEPA, stating that "we see no reason why the law should be different under the Federal Power Act." Pet. App. 11. However, the Ninth Circuit relies on statements from NEPA cases to the effect that EISs should precede major federal action because "after major investment of both

---

[8] As the Commission has repeatedly stated, initial licensing and relicensing are not the same, and the comments of the Commission set forth in that report were also made in the context of the procedural requirements of the APA and do not constitute, as the Secretary claims, an acknowledgement by the Commission that initial licensing and relicensing are the same for the purposes of NEPA or the Federal Power Act.

time and money, it is likely that more environmental harm will be tolerated." This principle is inapplicable in relicensing situations under the Federal Power Act where the entire investment has been made many years before.

Finally, the Supreme Court's decision in *Udall v. FPC*, 387 U.S. 428 (1967) and the Second Circuit's decision in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (1965), *cert. denied*, 384 U.S. 941 (1966), simply do not provide any basis for the Ninth Circuit's conclusion that the law is "well defined" as prohibiting the procedure adopted by FERC in a relicensing situation. Pet. App. at 10. Respondent Commerce's continued reliance on these cases is particularly surprising given its effort to distinguish the Commission's reliance on *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 104 S.Ct. 2105 (1984). Commerce Brief at 9 n.6. Commerce points out that *Escondido* involved a question under § 4(e) of the Act and is therefore irrelevant to a relicensing issue. Neither *Udall v. FPC* nor *Scenic Hudson*, of course, were relicensing cases and similarly arose pursuant to the Commission's authority to issue licenses established in § 4(e) of the Act. *E.g.*, *Udall v. FPC*, 387 U.S. at 431 & n.1.

In language which Respondents now contend was *dicta*, the Ninth Circuit rejected the procedure adopted by FERC in this case, stating that "we do see a distinct possibility for harm resulting from utilization of a procedure designed to impose fish protection measures in a modification proceeding," Pet. App. 13, on the ground that "the Commission's discretion is curtailed in a modification proceeding." *Id.* at 14. The Commission is entitled to adopt its own procedures unless the procedure does not permit it to discharge its duties under the Act. The Ninth Circuit's reasoning quoted above thus is not *dicta* because only if the Commission is incapable of imposing, pursuant to § 6 of the Federal Power Act, additional fish protection measures after issuance of a license

containing a reopener clause can the Court's decision be upheld.

Respondents, however, do not address the issue of the Commission's power under § 6 of the Act to use reopener clauses—one of the two basic issues in the case. Instead Respondents indirectly attack the Commission procedure by seeking to minimize the achievements of the Commission in developing a long-term, system-wide series of fish protection measures through the vehicle of the Mid-Columbia proceeding. The flaws in this method of attack are twofold. First, it is not the basis upon which the Ninth Circuit decided the case. Secondly, in seeking to create the impression that the Commission is not making any progress in the Mid-Columbia proceeding, Respondents take great liberties with the record. For example, the hearings to be conducted concerning Rock Island are not confined to Chelan's "opposition to further annual stipulations,' Commerce Brief at 6, but rather will address the need for further mitigation measures for Rock Island given the results of studies which show far lower mortalities due to the design of Rock Island's "bulb" turbines. The description of the scope of a stipulation between the parties by counsel for the Secretary in a letter dated March 28, 1985 to the administrative law judge (attached hereto as an Appendix) also belies the assertion that project operations at the other dams are proceeding on the basis of annual stipulations with "no schedule for long-term resolution of fishery issues . . ." Commerce Brief at 6; Yakima Brief at 8.

The procedure preferred by the Secretary of Commerce and the Ninth Circuit of issuing annual licenses until the Commission was prepared to impose further fish protection measures would not have provided any greater first protection than that chosen by the Commission. Interim fish protection measures have been developed in the Mid-Columbia proceeding and a framework for the development of long-term measures is now in place. The

Mid-Columbia proceeding is a reasonable means of achieving the goals of the Federal Power Act and is in full compliance with the provisions of that Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

DAVID J. DORSEY
DAVIS, ARNEIL, DORSEY, KIGHT & PARLETTE
617 Washington Street
P.O. Box 2136
Wenatchee, WA 98801
(509) 662-3551

JAMES B. VASILE
Counsel of Record
MICHAEL F. HEALY
JILL E. GRANT
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600

Attorneys for Petitioner Public Utility District No. 1 of Chelan County, Washington

APPENDIX

APPENDIX

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel, GCNW
7600 Sand Point Way N.E., BIN C15700
Seattle, Washington 98115
(206) 526-6075; FTS 392-6075

March 28, 1985

Honorable Stephen L. Grossman
Presiding Administrative Law Judge
Federal Energy Regulatory Commission
825 North Capitol Street N.E.
Washington, D.C. 20426

RE: Mid-Columbia Proceeding
Docket No. E-9569

Dear Judge Grossman:

Enclosed please find the Stipulation entered into by the Public Utility District No. 2 of Grant County, the Public Utility District No. 1 of Chelan County, the Public Utility District No. 1 of Douglas County, the Washington Departments of Fisheries and Game, the Oregon Department of Fish and Wildlife, the National Marine Fisheries Service, and the Colville Tribe, as discussed at our October 30-31, 1984 conference. The Yakima Indian Nation and the Umatilla Tribe have not yet become signatories to the Stipulation.

The Stipulation is a framework agreement on interim protection and development of long-term juvenile fish passage measures for four of the five Mid-Columbia hydroelectric projects, excluding Rock Island Dam. The agreement is in effect now and extends through 1987 in the case of Rocky Reach Dam, and through 1988 in the case of Priest Rapids, Wanapum, and Wells Dams.

Copies of the Stipulation have been served on all parties to this proceeding.

Sincerely,

/s/ F. Lorraine Bodi
F. LORRAINE BODI
Attorney for the National Marine Fisheries Service

Encl.: As noted
cc: All parties
GC File #502-18.6